91-1660

Supreme Court, U.S.
FILED
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1992

JOHN W. BRENNEN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Third Circuit Court of Appeals err when it affirmed the District Court's denial of John W. Brennen, Jr.'s Motion to Suppress Evidence by holding that a warrantless search and seizure of child pornography contained in a sealed envelope received by Petitioner through first class mail and forcibly taken from his person by Government officers is permissible under the controlled delivery exception established by this Court in the case of *Illinois v. Andreas,* 463 U.S. 765 (1983) in spite of the fact that the material seized was child pornography, *not* contraband.

LIST OF PARTIES

The parties to the proceeding below were Petitioner, John W. Brennen, Jr. ("Brennen") and Respondent the United States of America ("the Government").

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is unpublished and is annexed hereto as Appendix A (A-1). The Sur Petition for Rehearing of the Court of Appeals for the Third Circuit is unpublished and is annexed hereto as Appendix B (A-12).

JURISDICTION

On August 18, 1989, John W. Brennen, Jr. was indicted on a one count indictment charging him with knowingly receiving child pornography through the mail in violation of 18 U.S.C. 2252 (a)(2).

The case of U.S. vs. John W. Brennen, Jr. was tried on October 16, 1989. Brennen was convicted by a jury.

On appeal, the Third Circuit Court of Appeals reversed the trial court and returned the case for a new trial. On December 10, 1990, Defendant moved to suppress the evidence, "1 videotape and 2 Lolita Magazines". On March 1, 1991, Defendant's motion was

denied. John Brennen's second trial commenced on April 22, 1991. Defendant was convicted by a jury. The Court entered judgment on July 18, 1991. The Defendant again appealed to the Third Circuit Court of Appeals on July 25, 1991.

On January 28, 1992, the Third Circuit Court of Appeals denied Defendant's appeal. The Court of Appeals filed its opinion affirming John W. Brennen, Jr.'s conviction on February 12, 1992. On February 26, 1992, Defendant petitioned for rehearing which the Court of Appeals denied on March 9, 1992.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. Section 2252(a)(2) entitled "Certain activities relating to material involving the sexual exploitation of minors".

STATEMENT OF THE CASE

On November 9, 1988, Postal Inspector Robert Hayes delivered a package containing one videotape and two (2) Lolita magazines which he had prepared from materials seized in prior cases. He delivered said material in a sealed postal envelope to the Postmaster Concordville Post Office, Concordville, Pennsylvania for delivery to Defendant via first class mail. The Defendant appeared at the post office and the package was delivered to him. Postal Inspector Hayes and other Federal and state Government law enforcement officers maintained surveillance of the package until Defendant obtained the package from the post office. The Defendant was surrounded by law enforcement officers before he had occasion to open the package. At this time, Postal Inspector Robert Hayes grasped the package and pulled it from John Brennen's hand. Defendant was never arrested. No warrant was ever sought or obtained. No

evidence was introduced at trial to establish that the materials used in this controlled delivery were ever submitted to any judicial officer or magistrate in this or any prior case to determine if the contents violated Statute 18 U.S.C. 2252(a)(2) or was entitled to First Amendment protection.

REASONS FOR GRANTING THE WRIT

The Court of Appeals decision that seizure from the person of the Defendant, John W. Brennen, Jr. of a sealed, first class mail envelope mailed to him by Government investigators, which envelope contained one videotape and two magazines (child pornography) not incident to a lawful arrest, did not require issuance of a search and seizure warrant by a magistrate or judicial officer because it was exempt from the Fourth Amendment requirement by the controlled delivery exception to the Fourth Amendment, was not a correct application of the law because the controlled delivery exception applies to contraband, not material with First Amendment considerations which require special constraints.

The Petitioner asserts that the seizure from his person of a sealed envelope containing one videotape and two magazines received by him via first class mail by a U.S. Postal Inspector without a warrant violated his constitutional rights protected under the Fourth Amendment to the Constitution of the United States.

The Third Circuit Court of Appeals relied upon *Illinois v. Andreas,* 463 U.S. 765 (1983) which extended the Plain View Doctrine to controlled deliveries of contraband under certain limited circumstances.

The controlled delivery concept applied in *Illinois v. Andreas,* Supra. involved contraband drugs. To the best of Petitioner's knowledge, this concept has not previously been extended to include cases involving the First Amendment.

In reviewing the case authority, it appears that two lines of cases have developed, those involving contraband such as drugs, the possession of which is illegal and to which no First Amendment consideration is required which is the line of cases following *Illinois v. Andreas,* Supra. and those involving materials which require the First Amendment consideration such as the materials which were the subject of the suppression Motion in John W. Brennen, Jr.'s case which follow the line of cases such as *Roaden v. Kentucky,* 413 U.S. 496 (1973); *Lo Ji Sales, Inc. v. New York,* 442 U.S. 319, 60 L.Ed. 2d 928 (1979); and the Circuit Court cases *U.S. v. Kelly,* 529 F.2d 1365 (8th Cir 1970); *U.S. v. Hale,* 784 F.2d 1465 (9th Cir 1986).

The Third Circuit Court of Appeals failed to recognize the distinction between the contraband cases and this First Amendment pornography case.

In the *Andreas* case, the reasonable expectation in the right to privacy only existed if the contents of the container to be seized were concealed from government investigation because in *Andreas* the subject matter of the seizure was contraband drugs. Contraband is defined in *Black's Law Dictionary,* 4th Edition at page 393 as "goods imported or exported into a country against its laws". The possession of contraband is illegal. There can be no reasonable expectation of privacy in contraband goods. Once they are discovered, they can be seized. A private citizen has no right to possession, custody or control of contraband. Therefore, seizing them is not in contravention of a reasonable expectation of privacy so long as the knowledge of the existence of the contraband was acquired legally. *United States v. Jacobsen,* 466 U.S. 109, 80 L.Ed. 2d 85 (1984).

In John Brennen's case, the subject matter of the search was one videotape and two Lolita magazines alleged to contain visual depictions of minor's engaged in sexual acts in violation of the 18 U.S.C. 2252(a)(2).

Under federal law and the law of Pennsylvania, at the time the materials were seized from John Brennen

(November 9, 1988), they were *not contraband.* The importation or exportation of such materials was not prohibited by law, nor, more importantly, was it illegal to possess them. In fact, Petitioner could legally possess these materials in the privacy of his home or elsewhere without violating the law.

This Court has held that the plain view exception to the Fourth Amendment search warrant requirement as applied to contraband has no application to cases involving First Amendment materials. In the case of *Lo Ji Sales, Inc. v. New York,* 442 U.S. 319, 60 L. Ed. 2d page 928 (1979), Note 5, when it stated, ". . . contraband may be seized without a warrant under the Plain View Doctrine. Materials normally may *not* be seized on the basis of an alleged obscenity without a warrant, but we have recognized special constraints upon material protected by the First Amendment". (Citations omitted; emphasis added.)

The material received by John W. Brennen, Jr. was placed in first class mail in a sealed brown postal mailing envelope by U.S. Postal Inspector Hayes as part of a controlled delivery. The law prohibits searches and seizures of first class mail without a warrant. *Ex Parte Jackson,* 96 U.S. 727 (1878); *Roaden v. Kentucky,* 413 U.S. 496 (1973).

Black's Law Dictionary 4th Edition, page 1433 defines "receive", ". . . to take into possession and control; accept custody of. . ."

The receipt of the child pornography by first class mail was a transfer of possession, custody and control to the Defendant. Under Title 18 U.S.C. 2252(a)(2), the Government must, as an element of the crime, establish the Defendant's receipt of the child pornography. Therefore, the Government intended to and did convey to John W. Brennen, Jr. possession, custody and control of the envelope and its contents giving rise to a bona fide right to privacy in the contents of the first class mail envelope which its agents were not entitled to invade without a

duly issued search and seizure warrant without violating his rights under the Fourth Amendment to the Constitution.

The materials in this case were never scrutinized by a judicial officer or magistrate before seizure to determine if the contents were a violation of 18 U.S.C. Section 2252(a)(2) or protected by the First Amendment. This determination is one to be made by a judicial officer in advance of seizure and not by law enforcement officers, or the Court on the basis of hindsight. Otherwise there would be a substantial restriction on the exercise of free speech and communication.

In the case of *Coolidge v. New Hampshire,* 403 U.S. 443, 91 Sup. Ct. Rep. 2022, etc. (1971), this Court, when dealing with a law enforcement officer's right to decide that the material to be seized violated the law and that therefore, the officer was free to dispense with a search warrant, made the following statements which are applicable to John W. Brennen, Jr.'s case. At page 2029:

> ". . . prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations – the 'competitive enterprise' that must rightly engage their single-minded attention."

at page 2032 (455 U.S.):

> "This the most basic constitutional rule in this area is that searches conducted outside the judicial process without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment. . ."

and further at page 2031 (454 U.S.):

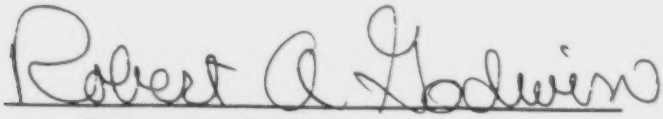
> "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon."

The warrantless seizure of the material contained in the first class mail envelope from the person of John W. Brennen, Jr. which he had a legal right to possess and therefore a reasonable expectation of privacy therein is just such stealthy encroachment.

CONCLUSION

The Third Circuit Court of Appeals' decision in this case, if not reversed by this Court will further erode the constitutional rights of the citizens protected by the Fourth and First Amendments to the Constitution of the United States. The requirement that a search and seizure warrant be issued as a prerequisite to seizing materials communicating ideas from the person or the mail of an individual in child pornography and obscenity cases would not impair, to any noticeable degree, the law enforcement officers' ability to carry out their duty and would avoid the greater evil of further Government intrusion upon the essential freedoms of the citizens.

Respectfully submitted,



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April 10, 1992

APPENDIX

NOT FOR PUBLICATION

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1619

UNITED STATES OF AMERICA

vs.

JOHN BRENNEN
John W. Brennen, Jr.

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 89-00291-01)
District Judge: Honorable Herbert J. Hutton

Submitted Under Third Circuit Rule 12(6)
January 31, 1992
Before: SLOVITER, *Chief Judge,* MANSMANN and HUTCHINSON, *Circuit Judges.*

(Filed Feb. 12, 1992)

MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In this appeal from the district court's judgment of sentence in this criminal matter, the defendant raises questions concerning the suppression of evidence and the use of the Sentencing Guidelines. We find that the district court may have erred as a matter of law by believing it could never take a defendant's military record into consideration for a downward departure.

Nonetheless, because here the defendant's record was not so exceptional as to warrant a departure, we will affirm the judgment of sentence. In all other respects, we find that the district court did not err.

I.

The defendant, John W. Brennen, Jr., was indicted in July, 1989, and charged with one count of receipt of mailed visual depictions of minors engaged in sexually explicit conduct, *i.e.,* child pornography, in violation of 18 U.S.C. § 2252(a)(2). Brennen's indictment was the result of a government sting operation intended to net individuals ordering child pornography through the mail. Officer Dennis Guzy of the Philadelphia Police Department corresponded with Brennen several times after Brennen responded to an ad placed by the government in an adult magazine.

Assisting Officer Guzy, Postal Inspector Hayes prepared a package containing one videotape and two *Lolita* magazines and addressed it to Brennen. Hayes turned the package over to the Post Office Postmaster for delivery to Brennen. Several state and federal officers were stationed throughout the post office to watch for the delivery of the package. After Brennen picked up the package and left the post office, he was approached by Hayes and several other officers.

Brennen claimed he was on his way to deliver the package to his superiors at the state police headquarters. He consented to the search of his car and accompanied an officer to his house where his residence was searched. The search by government agents revealed the letters from Guzy to Brennen which were written as part of the sting operation. The letters were not introduced into evidence at Brennen's second trial.[1] The

1. This is the second appeal Brennan has brought before us. Previously, Brennan raised the argument that the district court had erred by failing to instruct the jury as to his defense; that he had sent for the pornographic materials as part of his own, unauthorized

government relied primarily on the evidence of the package, containing the videotape and magazines, which was seized from Brennen.

Brennen moved to suppress the evidence on the ground that it was the result of an unlawful, warrantless seizure. The government defended the warrantless seizure on the basis of the plain view exception to the Fourth Amendment. The district court denied Brennen's motion to suppress.

Just prior to trial, Brennen notified the court and the prosecution that he wanted to call two experts, one a psychologist, the other a psychiatrist, to testify that Brennen did not fit the profile of a pedophile. The government objected on the basis of Federal Rule of Criminal Procedure 12.2(b) which requires the defendant to notify the government of the intention to call an expert witness to testify as to the defendant's mental condition. The district court sustained the government's objection and excluded the testimony of the expert witnesses.

The jury returned a verdict of guilty and Brennen was subsequently sentenced under the Sentencing Guidelines. Brennen challenged the presentence report prepared by the probation office on several points. First, Brennan felt he should have a two point reduction in offense level due to his acceptance of responsibility for his crime.[2] Second, Brennen argued that the two point increase due to the prepubescent (under 12) age of the children in the videotape was erroneous because there was no proof as to the age of the children involved. Brennen also argued that the district court should take into consideration his length of service with the state police and the naval reserve and adjust downward when

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investigation into child pornography. We remanded for a new trial after concluding that the requested jury charge should have been given. *United States v. Brennan,* No. 90-1106 (3d Cir. Sept. 14, 1990)(unpublished opinion).

2. Brennen does not pursue that challenge on appeal.

setting the sentence. The district court rejected Brennen's arguments and sentenced him to eighteen months imprisonment, a two year term of supervised release and a $ 4,000 fine plus the costs of the supervised release. Brennen filed a timely appeal from his sentence.

II.

Brennen's challenge to the district court's denial of his motion to suppress the evidence involves a mixed question of law and fact. We review the issue in its separate parts, applying a plenary standard to the legal question and a clearly erroneous standard to the questions of fact. We review the district court's refusal to permit Brennen to introduce expert testimony for an abuse of discretion. The finding of facts by the district court upon which Brennen's offense level was increased are reviewed under a clearly erroneous standard. We have plenary review of the district court's determination that it could not depart downward from the Guidelines, as a matter of law, on the basis of Brennen's record in the state police and the naval reserve. Nonetheless, we do not have jurisdiction to review decisions by the district court not to exercise discretion to depart downward. *United States v. DeNardi,* 892 F.2d 269 (3d Cir. 1989)

III.

Brennen contends that the district court erred by failing to suppress the evidence of the package taken from him by the postal inspector because the seizure violated the Fourth Amendment. The government counters that the seizure falls under the plain view exception to the Fourth Amendment.

The United States Supreme Court has stated that the "First Amendment imposes special constraints on searches for and seizures of presumptively protected material and requires that the Fourth Amendment be

applied with 'scrupulous exactitude' in such circumstances." *Maryland v. Macon,* 472 U.S. 463, 468 (1985) (citations omitted). The fundamental concern of the interplay between the Fourth Amendment and the First Amendment is the concern that a seizure will result in prior restraint. *Id.* at 470.

Brennen relies on *Maryland v. Macon* as well as on *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976) to support his contention that the warrantless seizure of the package he picked up at the post office was a violation of the Fourth Amendment. In *Kelly,* the Court of Appeals for the Eighth Circuit held that the government had violated the Fourth Amendment when it had seized adult books and magazines without obtaining a warrant after they were inadvertently discovered in a damaged parcel by a UPS employee. The court of appeals in *Kelly* concluded that the warrantless seizure did not meet any of the known exceptions to the Fourth Amendment warrant requirement, *i.e.,* the plain view exception or the exigent circumstances exception. 529 F.2d at 1372. Moreover, because the shipment contained printed materials, which are presumptively protected by the First Amendment, the court reasoned that a magistrate's determination of obscenity was required at the time of issuance of a warrant. 529 F.2d at 1373.

Although Brennen's argument is facially attractive, we must reject it in light of the Supreme Court decision in *Illinois v. Andreas,* 463 U.S. 765 (1983). In *Andreas,* a customs inspector at the Chicago airport opened a package containing a wooden table which had been shipped from Calcutta to Andreas. The inspector found marijuana hidden in the table and notified the Drug Enforcement Agency ("DEA"). After the DEA agent tested the material to confirm its contraband nature, the customs agent resealed the package. The DEA agent and a local police detective acted as delivery men and delivered the package to the defendant.

While the detective sought a search warrant, the DEA agent took up surveillance of the defendant's

apartment. When the defendant left with the shipping container before the warrant arrived, the DEA agent arrested him and seized the package. It was reopened at the police station where the marijuana was discovered (again).

Regarding Andreas' motion to have the evidence of the marijuana suppressed since it was the result of a warrantless search and seizure, the Supreme Court concluded that the agent had made a controlled delivery of the package and that the defendant had lost his expectation of privacy in the package once it was lawfully opened and its contents were made known to the police. 463 U.S. at 771.[3]

Here, Inspector Hayes was cognizant of the contents of the package, having wrapped it himself. Thus, he knew the parcel contained the pornographic materials ordered by Brennen, he knew the description of the package and he knew its location even when he did not have actual physical possession of it. Once the parcel was delivered to Brennen by the Postmaster at the window of the post office, delivery was complete and the requisite receipt through the mail was attained. The Supreme Court analogized the controlled delivery concept to the plain view doctrine in *Andreas:*

> The plain view doctrine is grounded on the proposition that once police are lawfully in position to observe an item firsthand, its owner's privacy interest in the item is lost; the owner may retain the

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3. The dissent in *Andreas* raised a question about the nature of the control of the delivery. Justice Brennan was concerned that an individual could regain a privacy interest in a parcel if it was left in his or her possession for a short period of time out of control and view of the police. Moreover, Justice Brennan was concerned with the majority equating "secrecy" with "privacy". However, because the parcel at issue in this appeal now before us was only in the possession and control by the defendant when he walked from the post office window to the exterior of the building where he was approached by Inspector Hayes, the concerns expressed by the dissent in *Andreas* do not come into play.

> incidents of title and possession but not privacy. That rationale applies here; once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost.

Andreas, 463 U.S. at 772-73. Here, Inspector Hayes made a controlled delivery of material known to be pornographic in which Brennen could have no reasonable expectation of privacy and for which no warrant was necessary.

IV.

Brennen next argues that the district court erred by refusing to permit him to introduce expert testimony that he did not fit the profile of a pedophile. Under Federal Rule of Criminal Procedure 12.2, if a defendant wishes to introduce expert testimony relating to a mental condition bearing on the issue of his guilt, he must notify the government of his intent in writing. Fed. R. Crim. P. 12.2(b). The government argues that the district court acted properly in denying the proposed testimony in light of the defense's failure to notify the government and because, as provided by Federal Rule of Evidence 401, the evidence was not relevant or helpful to the trier of fact.

Because the district court sustained the government's objection without giving a statement of reasons, we will assume *arguendo* that the district court denied the admission of the testimony because it felt it was irrelevant. In order to determine if the court acted properly, we must ascertain the purpose for which the proposed testimony was offered. Brennen's defense was that he knew the material was pornographic but he sent for it in order to turn the material over to his superiors. In other words, his own "sting operation" was his justification for receiving the material. Therefore, the expert testimony was proffered to demonstrate that if the

defendant did not exhibit the signs of a pedophile, then his reason for receiving the material must be to run his own investigation.

Under these circumstances, the expert testimony would not have been helpful to the trier of fact. Rather, it would have introduced another collateral issue to the trial resulting in a battle of the experts with regard to a character trait. Moreover, Brennen, his former wife and his friends, all testified that he did not exhibit any indications of pedophilia. Because the evidence would have been, at best, cumulative, the district court properly excluded the testimony.

V.

Finally, Brennan raises two sentencing issues. First, he argues that the district court erred by increasing the offense level two points because of the age of the minors involved. In light of Brennen's challenge to the presentencing report's information as to the age of the minors, the government had the burden of demonstrating the age of the children by a preponderance of the evidence. The government produced the testimony of Officer Guzy, who was an expert with regard to child pornography. In addition, the district court was able to view the magazines themselves to determine the age of the minors. With evidence to support the district court's conclusion that the age of the minors was below twelve or prepubescent, we cannot say that the district court's determination for sentencing purposes was clearly erroneous.

Secondly, Brennen contends that the district court erred by failing to take into consideration his long career as a state police officer and his twenty-some years in the naval reserve. Under part H of the Sentencing Guidelines dealing with Specific Offender Characteristics, § 5H1.5, the Sentencing Commission stated that employment record is *not ordinarily* considered relevant in determining whether a sentence should be outside the

Guideline range.[4] Nonetheless, the Commission did not foreclose the use of such factors as military record in an exceptional circumstance, leaving this factor to the sound discretion of the sentencing judge.

For example, in *United States v. Pipich,* 688 F.Supp. 191 (D.Md. 1988), the district court departed from the Sentencing Guidelines under § 5B1.1(a)(2) when it was faced with a defendant with an exceptional military record. The court concluded that the Commission had not taken past military record into consideration when drafting the Guidelines.

There the defendant pleaded guilty to one count of theft of mail matter by a postal employee. The defendant had served in the marines from 1968-1972, serving a tour of duty in Vietnam from 1969-1970. He received 45 awards of the Air Medal, including a special award for heroism in connection with a reconnaisance team night extraction in 1969, two Purple Hearts and several Vietnamese awards. 688 F.Supp. at 192. The district court departed by sentencing the defendant to probation without confinement.

In comparison, the Court of Appeals for the Eighth Circuit concluded in *United States v. Neil,* 903 F.2d 564 (8th Cir. 1990) that a defendant whose military record consisted of eleven years served on the continental United States mostly as a recruiter, though commendable, did not satisfy the Guidelines' allowance for departure in an *exceptional* case. 903 F.2d at 566. The court

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4. Under the Guidelines effective November 1, 1991, § 5H1.11 provides that:

> military, civic, charitable, or public service; employment related contributions; and similar prior good works are *not ordinarily* relevant in determining whether a sentence should be outside the applicable guideline range.

United States Sentencing Commission Guidelines Manual, § 5H1.11 (effective November 1, 1991) (emphasis added).

This additional Guideline addresses the problem raised in *United States v. Pipich,* 688 F.Supp. 191 (D.Md. 1988), discussed *infra.*

of appeals likened the defendant's stateside military record to an employment history under Guidelines § 5H1.5.

In *United States v. McCaleb,* 908 F.2d 176 (7th Cir. 1990) the Court of Appeals for the Seventh Circuit acknowledged *Pipich* and *Neil* when it stated: "The district court did not dispute – nor do we – that a person's military record might, under some circumstances, warrant a downward departure." *McCaleb,* 908 F.2d at 179 (relying also on 18 U.S.C. § 3553(b)).

Here, the district court apparently believed that the Guidelines did not allow any departure on the basis of military record. The district court, in sentencing Brennan, remarked:

> On the issue regarding the motion for a downward departure from the Guidelines there is no basis in this court's review of the Guidelines for a downward departure for either the reasons of the exemplary military record of the defendant or his exemplary record as a Pennsylvania State Policeman. The Guidelines do not provide for consideration of these prior involvements of obvious meritorious service, but the Guidelines do not speak to these as being valid areas for a Court to downward depart.

This constitutes legal error since the Guidelines would permit a discretionary departure on the basis of a defendant's military record in *exceptional* circumstances. *See* Sentencing Guidelines Manual, § 5H1.11, *Pipich,* 688 F.Supp. at 192, and *Neil*, 903 F.2d at 566.

Although it remains within the sound discretion of the sentencing court to determine if departure is warranted,[5] the defendant must show that indeed his

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5. We were faced with the issue of whether the sentencing court had violated a defendant's due process rights by failing to take his military record into consideration upon sentencing in *United States v. Chiarelli,* 898 F.2d 373 (3d Cir. 1990). Chiarelli did not raise the issue of his military record as a reason for departure under the Sentencing Guidelines, however. Rather, his argument was

military or police service record meets the threshold requirement of being so extraordinary as to support a departure. Despite the district court's use here of the adjectives "exemplary" and "meritorious" in referring to Brennen's military and state police employment records and to his service, we conclude from all the facts of record that these were not so exceptional that the district court could, if it wished, exercise its discretion to depart downward. While we recognize that Brennen apparently performed faithfully and competently, he was not cited for continuing exceptional service nor was he the recipient of any awards for heroism or bravery under fire as in *Pipich*. His record clearly falls closer to that in *Neil*. Thus the district court did not abuse its discretion in failing to depart downward.

VI.

Because no exceptional grounds for departure exist here, and since we have affirmed the district court's decisions on all other matters, the judgment of sentence will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Carol Los Mansmann

Circuit Judge

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premised on substantive due process grounds relating to individualized sentencing. We held that the individualized sentencing argument had no vitality after our decision in *United States v. Frank*, 864 F.2d 992, 1009 (3d Cir. 1988).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1619

UNITED STATES OF AMERICA

vs.

JOHN BRENNEN
John W. Brennen, Jr.,

Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,*
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON,
SCIRICA, COWEN, NYGAARD, ALITO
and ROTH, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

March 9, 1992